UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNIVERSITY OF CINCINNATI CHAPTER OF YOUNG AMERICANS FOR LIBERTY, *et al.*,	:	**Case No. 1:12-CV-155**
Plaintiffs,	:	**Judge Black**
-vs-	:	
UNIVERSITY OF CINCINNATI, *et al.*,	:	
Defendants.	:	

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

Now come Plaintiffs, by and through counsel, and respectfully move this Honorable Court for Summary Judgment on all claims in this matter other than those of damages, attorneys fees, and the individual liability of Defendant Brittany Sisko. Pursuant to Local Rule 7.2(a)(1), this Motion is accompanied by a Memorandum in Support.

Curt C. Hartman (0064242) *Co-counsel for Plaintiffs* The Law Firm of Curt C. Hartman 3749 Fox Point Court Amelia, Ohio 45102 Tel: (513) 752-8800 hartmanlawfirm@fuse.net	Respectfully submitted, */s/ Maurice A. Thompson* Ryan D. Walters (0076724) *Trial Attorney for Plaintiffs* Maurice A. Thompson (0078548) 1851 Center for Constitutional Law 208 E. State Street Columbus, Ohio 43215 Tel: (614) 340-9817 Fax: (614) 365-9564 rwalters@ohioconstitution.org mthompson@ohioconstitution.org

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Defendants have unconstitutionally prevented and restrained Mr. Morbitzer and Young Americans for Liberty from fully and meaningfully engaging in core political speech with their fellow students on the campus of the University of Cincinnati, and their policies act as a prior restraint on speech in public forums on campus, and their policies regarding speech on campus are unconstituionally vague and allow arbitrary application by government officials.

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

This case presents a facial and as-applied challenge to the University of Cincinnati's (the "University" or "UC") combined restrictions on student speech on campus – restrictions that have recently earned the University the designation of "the nation's worst college for free speech."[1] The University's prohibition against any and all spontaneous student speech anywhere on campus, *i.e.* speech in the absence of adherence to UC's five- to 15-day notification requirements and prior permission, is overbroad and facially unconstitutional. The unconstitutionality of this prior restraint is enhanced by (1) the vague terms UC uses to assess the length of the applicable notification requirement ("demonstration, picket, or rally"; "events that require security and grounds"); and (2) the vesting of immense sole discretion in untrained low-level bureaucrats, who exercise that discretion arbitrarily, for the purpose of determining how speech is to be classified. Likewise, the unconstitutionality of this vagueness and discretion is enhanced by their coupling with prior restraints on all student speech on campus. Meanwhile, by burdening all student speech, rather than just disruptive or crowd-gathering speech, UC's combined speech policies are not narrowly tailored to achieve the regulatory interests that it asserts.

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[1] *Free Speech at UC under 'FIRE'*, April 2, 2012, Cincinnati News Record, available at http://www.journal-news.com/news/hamilton-news/free-speech-at-university-of-cincinnati-under-fire-1353902.html?cxtype=rss_local-news&viewAsSinglePage=true; The Top 12 Worst Colleges for Free Speech, March 28, 2012, the Daily Caller, available at http://dailycaller.com/2012/03/28/the-top-12-worst-colleges-for-free-speech/

Finally, regulations of such breadth are clearly unconstitutional as applied to non-disruptive individualized one-on-one interactions between students, such as Plaintiffs' circulation of the Ohio Workplace Freedom Amendment petition. Consequently, UC's combined speech policies must be invalidated.

II. SUMMARY OF FACTUAL BACKGROUND

UC speech policies consist of the Use of Facilities Policy Manual, the MainStreet Student Event Guide, the emails to Plaintiff Christopher Morbitzer ("Mr. Morbitzer") outlining restrictions on his free speech, and the unwritten but clear implications of each of these policies. On February 9, 2012, Mr. Morbitzer inquired of the University (and, specifically, the Office of Campus Scheduling) regarding Plaintiffs' desire to promptly begin collection of signatures in support of the Ohio Workplace Freedom Amendment initiative petition effort. As part of their inquiry, Plaintiffs also sought clarification as to whether their expressive activity qualified as a "demonstration, picket, or rally" such that the University would attempt to constrain and limit Plaintiffs' exercise of their free speech rights to the confines of the Free Speech Zone.[2] In response to Plaintiffs' inquiry, the Office of Campus Scheduling directed the Plaintiffs to use an online form to request the use of the McMicken Commons Northwest Corner (which is the designated Free Speech Zone).[3] Also within that response, the University (through Campus Scheduling) was very explicit: "you are not permitted to walk around campus, if we are informed that you are, [the Office of] Public Safety will be contacted."[4]

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[2] First Amended Verified Complaint ¶49 & Exhibit F (Doc. No. 15).

[3] First Amended Verified Complaint ¶50 & Exhibit G (Doc. No. 15).

[4] First Amended Verified Complaint at Exhibit G (Doc. No. 15).

Pursuant to the directive received from Campus Scheduling, Plaintiffs completed the additional, online application form.[5] Later that same day, the University (through Campus Scheduling) conditionally approved Plaintiffs' request, but specifically limited Plaintiffs' petitioning efforts to the Free Speech Zone and reiterated that Plaintiffs were not allowed "walk around."[6]

On February 15, 2012, Plaintiffs sought to engage in efforts in support of the Ohio Workplace Freedom Amendment, notwithstanding the fact that they were constrained and confined to the so-called Free Speech Zone pursuant to the University's policy and actions. Because of the isolation of the so-called Free Speech Zone, Plaintiffs observed that the overwhelming bulk of pedestrian student traffic occurred outside the limits of the so-called Free Speech Zone.[7] Thus, Plaintiffs' ability to engage in constitutionally protected expression was severely inhibited by UC policies and actions.

III. STANDARD FOR SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[8] "The moving party has the initial burden of proving

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5 First Amended Verified Complaint ¶53 (Doc. No. 15).

6 First Amended Verified Complaint ¶55 & Exhibit I (Doc. No. 15).

7 First Amended Verified Complaint ¶62 (Doc. No. 15).

8 Fed. R. Civ. P. 56(a).

that no genuine issue of material fact exists, and the court must draw all reasonable inferences in the light most favorable to the nonmoving party." [9]

"Once the moving party meets its initial burden, the nonmovant must 'designate specific facts showing that there is a genuine issue for trial.'"[10] "The nonmovant must, however, do more than simply show that there is some metaphysical doubt as to the material facts, . . . there must be evidence upon which a reasonable jury could return a verdict in favor of the non-moving party to create a genuine dispute."[11] "When a motion for summary judgment is properly made and supported and the nonmoving party fails to respond with a showing sufficient to establish an essential element of its case, summary judgment is appropriate." [12]

IV. LAW AND ANALYSIS

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech ... or the right of people peaceably to assemble." To evaluate a First Amendment claim, the Court must: (1) determine whether the speech is protected; (2) determine the nature of the forum where the speech is to occur in order to apply the correct standard; and (3) determine whether the justification presented by the government satisfies the applicable standard.[13] The level of scrutiny applied to speech in public fora depends on whether the statute at issue is content-based or content-neutral.[14] When the regulation is content-neutral, the government may "enforce regulations of the time, place, and manner of expression" so long as they are "narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication."[15]

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[9] *Stansberry v. Air Wisconsin Airlines Corp*., 651 F.3d 482, 486 (6th Cir. 2011) (internal quotations omitted); *cf.* Fed. R. Civ. P. 56(e)(2) (providing that if a party "fails to properly address another party's assertion of fact" then the Court may "consider the fact undisputed for purposes of the motion").

[10] *Kimble v. Wasylyshyn*, 439 Fed. Appx. 492, 2011 WL 4469612, at *3 (6th Cir. 2011) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)); *see also* Fed. R. Civ. P. 56(c) (requiring a party maintaining that a fact is genuinely disputed to "cit[e] to particular parts of materials in the record").

[11] *Lee v. Metro. Gov't of Nashville & Davidson Cnty*., 432 F. Appx. 435, 441 (6th Cir. 2011) (internal quotation marks and citations omitted).

[12] *Stansberry*, 651 F.3d at 486 (citing *Celotex*, 477 U.S. at 322-23).

In addition, the governmental actor bears the burden of establishing that the regulations meet the applicable standard.[16] With respect to First Amendment overbreadth challenges, courts in the Sixth Circuit frequently "will address the facial challenge first."[17]

A. Gathering signatures for a statewide constitutional amendment is protected speech.

"[T]he solicitation of signatures for a petition involves protected speech."[18] Indeed, this kind of speech "is at the core of our electoral process and of the First Amendment freedoms – an area of public policy where protection of robust discussion is at its zenith."[19] "[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"[20] That interactive communication comprises both the request for the signature and the signature itself, because the circulation of an initiative petition not only involves the "expression of a desire for political change," but also is a means of

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13 *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 797, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985).

14 *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

15 *Id.*

16 *Id.*

17 *Trewhalla*, infra.

18 *Meyer v. Grant*, 486 U.S. 414, 422 n.5 (1988).

19 *Id.* at 425. (citation and internal quotation marks omitted).

20 *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988).

"plac[ing] the matter on the ballot, [and thus making] the matter the focus of statewide discussion."[21] As such, "the circulation of a petition involves an element of speech beyond leafleting or sign-holding, because the collection of signatures – particularly for an initiative or referendum ballot – is essential to accomplishing the circulator's purpose."[22]

Here, there is no dispute that Plaintiffs seek to circulate petitions for a ballot initiative, and there is no evidence or contention that they would engage in any objectionable conduct. Further, the process of collecting signatures will necessarily involve the expression of opinions about the constitutional amendment being proposed.

B. *UC streets, sidewalks, open areas, and designated MainStreet Event Guide spaces are public forums as to UC students.*

Where First Amendment activity is concerned, the Supreme Court has adopted "forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes."[23] Historically, the Court has characterized government-owned property as one of three categories of forums: (1) the "traditional public forum," (2) the "public forum created by government designation," *i.e.*, the "designated public forum," and (3) the "nonpublic forum."[24]

A traditional public forum is a place which has " 'immemorially been held in trust for the use of the public, and, time out of mind, ha[s] been used for purposes of assembly,

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21 *Id.*

22 *Id.*

23 *Cornelius*, 473 U.S. at 800, 105 S.Ct. 3439.

24 *Id.* at 802, 105 S.Ct. 3439.

communicating thoughts between citizens, and discussing public questions.'"[25] Examples of traditional public forums include public streets, sidewalks, and parks.[26] In such traditional public forums, the government may never prohibit all expressive activity, and any content-based restrictions will be upheld only if narrowly drawn to accomplish a compelling governmental interest.[27] In addition, the government may enforce time, place, and manner regulations as long as they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[28]

The government may also create a second kind of public forum, commonly referred to as a designated public forum, by intentionally opening a "place or channel of communication," not traditionally considered a public forum, "for use by the public at large for assembly and speech."[29] To determine whether the government has created such a designated forum, a court must look to "the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum ... [and] examine [ ] the nature of the property and its compatibility with expressive activity to discern the government's intent."[30]

When designating such a forum, the government "is not required to indefinitely retain the open character" of the designated forum.[31] However, as long as the government maintains the

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25 *Perry*, 460 U.S. at 45, 103 S.Ct. at 954-55 (internal quotations omitted).

26 *See United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736 (1983).

27 *Perry*, 460 U.S. at 45, 103 S.Ct. at 955.

28 *Id*.

29 *Cornelius*, 473 U.S. at 802, 105 S.Ct. at 3449.

30 *Id*.

31 *Id*.

forum, restrictions on expressive activity in the designated public forum are subject to the same limitations that govern a traditional public forum.[32] As a further aid, a helpful distinction drawn by the Supreme Court in *Cornelius*, where it expressed its reluctance to find a designated public forum where "the principal function of the property would be disrupted by expressive activity."[33] The converse of this statement supplies this Court with an equally useful definition of what characterizes a public forum, viz, government property whose principal function would not be disrupted by expressive activity.

i. *University campuses can and must contain traditional and designated public forums.*

Central to the analysis in this case is the character of a public university campus. As with any government-owned property, the standard by which the constitutionality of any regulation of free speech and expressive activity on a public university campus must be evaluated "differ[s] depending on the character of the property at issue."[34]

As the Supreme Court has noted, "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'"[35] According to the Supreme Court, it cannot be argued that "either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[36]

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32 *See International Soc'y for Krishna Consciousness, Inc. v. Lee ("ISKCON II")*, 505 U.S. 672, 678, 112 S.Ct. 2701, 2705, 120 L.Ed.2d 541 (1992).

33 *Cornelius*, 473 U.S. at 804, 105 S.Ct. at 3450.

34 *Perry Educ. Ass'n*, 460 U.S. at 44, 103 S.Ct. at 954; *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc*., 473 U.S. 788, 800, 105 S.Ct. 3439, 3448, 87 L.Ed.2d 567 (1985) ("the extent to which the Government can control access depends on the nature of the relevant forum").

35 *Healy v. James*, 408 U.S. 169, 180, 92 S.Ct. 2338, 2346, 33 L.Ed.2d 266 (1972) (internal quotations omitted).

36 *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969).

Although First Amendment rights must always be applied "in light of the special characteristics of the ... environment in the particular case," and schools are afforded a certain degree of latitude to control conduct on their campuses, the Supreme Court has noted that "*state colleges and universities are not enclaves immune from the sweep of the First Amendment.*"[37] The precedents of the Supreme Court "leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, *the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools*." [38]

Further, "[t]he campus of a public university, at least for its students, possesses many of the characteristics of a public forum."[39]

ii. *Spaces UC has designated for speech are public forums.*

The district court in *Roberts v. Haragan* explicitly asked and answered the question "What Kind of Forum is the University Campus?" After acknowledging that "the entire University campus is not a public forum subject to strict scrutiny," the court explained that the "campus of a public university, at least for its students, possesses many characteristics of a public forum,"[40] given that (1) "[t]he campus's function as the site of a community of full-time residents makes it 'a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment,' and suggests an intended role more akin to a public street

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37 *Healy*, 408 U.S. at 180, 92 S.Ct. at 2345.

38 *Healy*, 408 U.S. at 180, 92 S.Ct. at 2346 (internal quotations omitted).

39 *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981).

40 *Roberts v. Haragan*, 346 F. Supp.2d 853 (N.D. Tex. 2004) (citing *Widmar v. Vincent*, 454 U.S. 263, 267 n. 5, 102 S.Ct. 269, 273 n. 5, 70 L.Ed.2d 440 (1981)).

or park than a non-public forum;"[41] and (2) as a community for its students, "[a] campus of a major state university is a microcosm of the [larger] community [outside its boundaries], and, as such, contains a variety of fora," both public and non-public.[42]

A governmental actor may create a public forum by "intentionally opening a nontraditional forum for public discourse."[43] Courts look to "the nature of the property and its compatibility with expressive activity,"[44] and also whether the government makes the property "generally available to a class of speakers, or grants permission as a matter of course. Restrictions on expression in such fora are evaluated under the same standard as that applicable to traditional public fora."[45]

The government's decision to limit access to the property is not dispositive in answering whether or not the government created a public forum.[46] In *Bowman v. White*,[47] the Eight Circuit found that a university had created a public forum in several outdoor areas on campus because "[t]he objective evidence in the record shows these particular areas combine the physical characteristics of streets, sidewalks, and parks, and are open for public passage. They do not include university buildings or stadiums, but they are located within the boundaries of the campus."[48] The court rejected the university's argument that these outdoor areas were nonpublic

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41 *Id*. (citing *Hays County Guardian v. Supple*, 969 F.2d 111, 117 (5th Cir.1992) (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness ("ISKCON I")*, 452 U.S. 640, 651, 101 S.Ct. 2559, 2566, 69 L.Ed.2d 298 (1981), and citing *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939)).

42 *Id*. (citing *Alabama Student Party v. Student Gov't Ass'n of the Univ. of Ala*., 867 F.2d 1344, 1354 (11th Cir.1989) (Tjoflat, C.J., dissenting)).

43 *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985).

44 *Id*.

45 *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

46 *Id*. at 805.

47 444 F.3d 967 (8th Cir. 2006).

48 *Id*. at 977.

fora, pointing to the university's policies and procedures permitting both students and outsiders to speak in the areas.[49]

These policies led the court to determine that the university had "designated the areas in question as locations for free expression" and held that the several outdoor areas on campus were "unlimited designated public fora" because "although the University gives preferential treatment to University Entities over Non-University Entities in regard to use of University space, there is little evidence that the University intended to limit the use of University space to a particular type of speech or speaker."[50]

a. The Free Speech Zone is a public forum.

Given the above rules of law, there can be no genuine issue as to any material fact, nor could reasonable minds disagree, as to whether the UC's Free Speech Zone, a grassy open space between slant walks measuring 82 by 124 feet, is a traditional public forum. First, UC labels it "the Free Speech Zone," and designates it as the go-to forum for free speech on campus. More importantly, the Free Speech Zone is available to any "individuals or groups wanting to use these areas," including "groups planning a demonstration, picket or rally."[51] Finally, UC "grants permission as a matter of course," as embraced in *Perry:* it asserts "if a request is made in compliance with the notice requirement and for a University location available to the expressive activity, the request is to be honored."[52]

b. Forums designated for speech in the MainStreet Event Guide are public forums as to UC students.

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49 *Id*. at 978–79.

50 *Id*. at 979.

51 UC Use of Facilities Policy Manual, pp. 14-15, attached to First Amended Verified Complaint as Exhibit A (Doc. No. 15).

52 Defendants' Answer to Plaintiff Christopher Morbitzer's Interrogatory No. 14, attached hereto as Exhibit A.

Here again, given the above rules of law, there can be no genuine issue as to any material fact, nor could reasonable minds disagree, as to whether forums UC has designated for student speech are designated public forums *as to students*. First, Defendants concede that students such as Plaintiffs have greater free speech rights on its campus than do non-students.[53] Second, Defendants, although in the course of attempting to deny it, effectively admit that the following forums are designated public forums for students, through their admission that such locations "may be used for student speech": Sigma Sigma Commons, Campus Green, McMicken Commons, open spaces surrounding Tangeman University Center and Campus Recreation Center, Tangeman University Center Plaza, Bearcat Plaza, Bearcat Pavilion, McMicken Free Speech Zone, Campus Recreation Center West Plaza, and Campus Recreation Center East Plaza.[54]

This admission is consistent with the law: the Fifth Circuit in *Hays County Guardian v. Supple* ruled that "the outdoor grounds of the campus such as the sidewalks and plazas are designated public fora for the speech of university students."[55] This admission is also consistent with the written policy of the MainSteet Student Event Guide. First, that Guide describes the above MainStreet forums as "a pedestrian corridor," and "the hub of campus activity," that is "available for hosting events."[56] And again, UC "grants permission as a matter of course," as embraced in *Perry:* Defendants assert "if a request is made in compliance with the notice requirement and for a University location available to the expressive activity, the request is to be honored."[57] Consequently, the MainStreet forums are designated public forums for students.

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[53] Response to Request for Admission No. 8, attached hereto as Exhibit B.

[54] Response to Request for Admission No. 4, attached hereto as Exhibit C; *see also* MainStreet Event Guide, attached hereto as Exhibit C.

[55] *Hays County Guardian v. Supple***,** 969 F.2d 111 (5th Cir 1992).

[56] *See* MainStreet Student Event Guide, p. 2, attached hereto as Exhibit C.

iii. *Otherwise undesignated UC streets, sidewalks, and open areas are public forums as to UC students.*

"Public places" historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, whether within or beyond the campus setting, are considered, without more, to be "public fora."[58] And the more a forum *resembles* a traditional public forum such as a park, street, or sidewalk, the greater an interest the state must show to justify restricting access.[59]

Further, "use of a forum as a public thoroughfare is often regarded as a key factor in determining public forum status."[60] Along these lines, the Sixth Circuit has held that even a privately-owned sidewalk operates as a traditional public forum because, *inter alia*, it is a "public thoroughfare" as it "is open to the public for general pedestrian passage."[61] As stated in that case, to determine if a sidewalk is in fact a traditional public forum depends upon a "case-by-case inquiry in which no single factor is dispositive."[62]

Applying these principles to a university's campus: "to the extent the campus has park areas, sidewalks, streets, or other similar common areas, these areas are public forums, at least for the University's students, irrespective of whether the University has so designated them or not. These areas comprise the irreducible public forums on the campus."[63] "The University, by express designation, may open up more of the residual campus as forums for its students, but it cannot designate less. Consequently, any restriction of the content of student speech in these areas is subject to the strict scrutiny of the 'compelling state interest' standard, and content-neutral restrictions are permissible only if they are reasonable time, place, and manner regulations that are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication."[64] Indeed, the Fifth Circuit ruled that "the outdoor grounds of the campus such as the sidewalks and plazas are designated public fora for the speech of university students."[65]

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[57] Defendants' Answer to Plaintiff Christopher Morbitzer's Interrogatory No. 14, attached hereto as Exhibit A.

[58] *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981).

[59] *Student Government Assoc. v. Board of Trustees of University of Massachusetts*, 676 F. Supp. 384, 386 (D. Mass. 1987), *aff'd* 868 F.2d 473 (1st Cir. 1989).

[60] *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1101 (9th Cir. 2003) (citing *Kokinda*, 497 U.S. at 727–28).

[61] *United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland, Inc.*, 383 F.3d 449, 452 (6th Cir. 2004).

[62] *Id.* at 453.

A ruling by the Sixth Circuit earlier this week reiterated that a public university's sidewalks are a traditional public forum. In *McGlone v. Bell*,[66] the court examined a claim by an outside preacher who wished to speak on the campus of a public university and held that "[t]he perimeter sidewalks along [the university's] campus are traditional public fora and all other open areas are designated public fora."[67] The court emphasized that "[s]idewalks have long been considered 'prototypical examples of traditional public fora," and noted that "[t]he burden is on [the university] to show that the sidewalk [at issue] is overwhelmingly specialized to negate its traditional forum status."[68] "Because the perimeter sidewalks at [the university] blend into the

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63 *Roberts*, supra.

64 *Id*.

65 *Hays County Guardian v. Supple***,** 969 F.2d 111 (5th Cir 1992).

66 Nos. 10-6055, 10-6169, 2012 U.S. App. LEXIS 8266 (6th Cir. Apr. 23, 2012).

67 *Id*. at *31.

68 *Id*. at *32.

urban grid and are physically indistinguishable from public sidewalks, they constitute traditional public fora."[69] Furthermore, the court in *McGlone* found that "[t]he other open areas at issue are designated fora."[70]

Here, the evidence is clear that UC streets, sidewalks, and open spaces resemble open spaces of city-owned parks, streets, and sidewalks.[71] In fact, the sidewalks on campus are wider than typical city sidewalks, and more conductive to free speech such as signature gathering.[72] Furthermore, UC is not a gated community: any person, student or not, can walk along UC sidewalks, stop and sit or eat lunch at an open university space, or merely use the sidewalks to pass from one place in the City of Cincinnati to another. And of course, such a person can have a conversation while doing so.

In *Bays v. Fairborn,*[73] the Sixth Circuit found this significant, noting "consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved,"[74] and that the regulations at issue there failed to serve a significant interest because "there is no fence surrounding the Festival at Community Park and no admission fee to enter, as there was in *Heffron*."[75] Similarly, *McGlone,* where the court found the open areas on a public university campus to be a designated public forum, noted that "[t]here

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69 *Id*. at *33.

70 *Id*. at *33.

71 *See* April 26, 2012 Declaration of Christopher Morbitzer, attached hereto as Exhibit D.

72 *Id*.

73 668 F.3d 814 (6th Cir. 2012).

74 *Bays v. Fairborn*, 668 F.3d 814, 822 (6th Cir 2012) (quoting *Heffron*, 452 U.S. at 650–51, 101 S.Ct. 2559).

75 *Id*. at 823.

are no fences or barricades on the perimeter of the campus to prevent members of the general public from gaining access to the campus."[76]

Further, a recognition of these forums, alongside those discussed below, as, at minimum, designated public forums, would be in harmony with the Ohio Administrative Code provisions governing UC's campus: In Ohio Administrative Code 3361:10-17-01, the board of trustees of the University of Cincinnati declares:

> (A) The university of Cincinnati, a public institution dedicated to providing an environment conductive to teaching, learning, research, and a continuing search for truth, will not take a position on any matter of political or public controversy.
>
> (B) Any individual member or group of members of the university community, like any other citizen or group of citizens, is free to debate and take a position on any matter of public controversy. But, since the collective reputation of the university cannot be abrogated by an individual or group as a means of supporting his/her or its position, any such activity must be taken in a way to make clear that it is not being carried on by or in the name of the university.

Thus, pursuant to the declaration of the board of trustees of the University of Cincinnati, the campus of the University of Cincinnati is dedicated to "providing an environment conductive to teaching, learning, research, and a continuing search for truth," and that "[a]ny individual member or group of members of the university community, like any other citizen or group of citizens, is free to debate and take a position on any matter of public controversy." These commitments are not limited to university faculty teaching students – they no doubt apply to UC students teaching each other, through free speech and robust debate on campus.

Consequently, there is no genuine issue of material fact on this front, and reasonable minds could only come to the conclusion that these streets, sidewalks, and open spaces assume the character of public streets, sidewalks, and open spaces, and are traditional public forums.

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[76] *McGlone*, 2012 U.S. App. LEXIS 8266 at *5.

iv. *All of UC's campus cannot be a "limited public forum," as Defendants contend.*

Defendants contend that its entire campus is a limited public forum. Their argument mirrors the failed argument of the defendants in *Roberts,* who asserted that (1) "the [U]niversity's mission is education for which its administration retains the authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities;"[77] and (2) "these distinctions establish that the University campus, presumably in its entirety, is a limited public forum."[78]

To be clear, just as in *Perry,* "[n]owhere [have Plaintiffs] suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for ... unlimited expressive purposes."[79] Instead, the *Roberts* Court explained that if not careful, the use of the word "limited" may cause confusion that exists over the nature of the campus: "Although a campus is 'limited,' in the general sense of that word, to the use of its students and personnel, this does not reduce it in its entirety to the category of a limited public forum subject to reasonableness standards, wherein the word 'limited' has a more technical, legal sense."[80] To conflate the two meanings is to ignore the fact that a university campus is a community in a very real sense to that group of persons to whom its use is "limited," and that as to them it "possesses many characteristics of a public forum." [81]

The Fifth Circuit aptly resolved the type of confusion Defendants in this are experiencing in *Hays County Guardian:*

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77 *Id*.

78 *Roberts v. Haragan*, 346 F. Supp.2d 853, 862 (N.D. Tex. 2004).

79 *Perry*, 460 U.S. at 44, 103 S.Ct. 948 (internal quotations and citation omitted).

80 *Roberts v. Haragan*, 346 F. Supp.2d 853, 863 (N.D. Tex. 2004).

81 *Widmar*, 454 U.S. at 267 n. 5, 102 S.Ct. at 273 n. 5.

> Defendants argue that the outdoor grounds of the University cannot be a designated public forum, because the University has not allowed unrestricted access to the campus, even by students. Government property, however, does not automatically cease to be a designated public forum because the government restricts some speech on the property. Otherwise, the restriction of speech on government property would be self-justifying. The restriction would disprove any intent to create a designated public forum, and the failure to create a public forum would justify the restriction of speech.[82]

The Supreme Court has not adopted such circular reasoning.[83] Rather, the Court looks to whether the government was motivated by "an affirmative desire,"[84] or "express policy,"[85] of allowing public discourse on the property in question.[86] Such a general policy of open access does not vanish when the government adopts a specific restriction on speech, because the government's policy is indicated by its *consistent* practice, not each exceptional regulation that departs from the consistent practice.[87]

The Eleventh Circuit has since further resolved this confusion by asserting that, as to those persons for whom "the government has made the property available [i.e., the students], a limited public forum is to be treated as a public forum ... [and] is bound by the same constitutional standards that apply in a traditional public forum contest [i.e., strict scrutiny]," whereas "for all other[s] ... it is treated as a nonpublic forum" subject only to a reasonableness standard.[88]

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[82] *Hays County Guardian v. Supple***,** 969 F.2d 111 (5th Cir 1992).

[83] *Id. (citing Estiverne v. Louisiana State Bar Ass'n,* 863 F.2d 371, 378 n. 9 (5th Cir.1989)).

[84] *Cornelius*, 473 U.S. at 805, 105 S.Ct. at 3450.

[85] *Id*. 473 U.S. at 802, 105 S.Ct. at 3449.

[86] *Hays County Guardian v. Supple***,** 969 F.2d 111, 117 (5th Cir 1992).

[87] *Stewart v. District of Columbia Armory Bd.*, 863 F.2d 1013, 1017 (D.C.Cir.1988).

[88] *See Alabama Student Party*, 867 F.2d at 1350.

v. *Limits on student speech in these forums must be narrowly tailored to serve a compelling interest.*

In addressing student speech on campus, the Fifth Circuit, in *Hays County Guardian v. Supple,* clarified the role of forum analysis on campus in an easily-digestible fashion: (1) "the government may designate a forum for the public at-large or only for certain speakers or for the discussion of only certain subjects;"[89] and (2) "in each case, speech for which the forum is designated is afforded protection identical to the protection provided to speakers in a traditional public forum."[90] Consequently, there is no genuine issue as to any material fact, and reasonable minds could not differ as to this conclusion: UC's Free Speech Zone, designated MainStreet forums, open areas, public streets and public sidewalks are either traditional public forums or designated public forums for students ("public forums").[91]

C. *UC's imposition of notice requirements and attendant burdens on all speech in all public forums throughout campus is facially unconstitutional.*

UC's application of prior restraints, vagueness, and insufficiently confined discretion to all student speech throughout all of areas of campus renders these policies (1) overbroad; and (2) not narrowly-tailored to achieve any interest UC could fathom.

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[89] *Hays County Guardian v. Supple***,** 969 F.2d 111 (5th Cir 1992), citing *Cornelius,* 473 U.S. at 802, 105 S.Ct. at 3449; *Perry Educ. Ass'n,* 460 U.S. at 46 n. 7, 103 S.Ct. at 955 n. 7.

[90] *Hays County Guardian v. Supple***,** 969 F.2d 111 (5th Cir 1992), citing *Kokinda,* 497 U.S. at ----, 110 S.Ct. at 3119.

[91] Of note, the Southwest Texas State University's Board of Regents' Rules used by the *Hays County* Court to justify the designation of public for a was nearly identical to the functional effects of the UC policies: "Any group or person, whether or not a student or employee, and whether or not invited by a registered student, faculty, or staff organization, may assemble and engage in free speech activities on the grounds of the campus. However, the University President or an authorized designee may adopt reasonable nondiscriminatory regulations as to time, place, and manner of such activities. The President, or the authorized designee, may prohibit such activities if it is determined, after proper inquiry, that the proposed speech constitutes a clear and present danger to the University's orderly operation as defined in Subsection 4.4 below."

i. *Principles of overbreadth, narrow-tailoring, and prior restraint govern analysis of UC speech policies.*

First, restrictions on speech may not be overbroad. In First Amendment contexts, however, the overbreadth doctrine "provides that the government may not proscribe a 'substantial' amount of constitutionally protected speech judged in relation to the statute's plainly legitimate sweep."[92] "'Overbreadth' has also been used to describe a challenge to a statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest."[93] In either case, a law that proscribes "a 'substantial' amount of constitutionally protected speech judged in relation to the statute's plainly legitimate sweep" is deemed overbroad and thus facially invalid.[94]

"Under the overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face because it also threatens others not before the court-those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."[95] This doctrine, while extremely circumscribed in most applications, is generally afforded a broader application where First Amendment rights are involved.[96] This is a consequence of the doctrine's concern that much protected speech might suffer a "chilling"

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92 *Phelps-Roper v. Strickland*, 539 F.3d 356, 360 (6th Cir.2008).

93 *Sec'y of State of Md. v. Joseph H. Munson Co*., 467 U.S. 947, 967 n. 13, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984).

94 *Phelps-Roper v. Strickland*, 539 F.3d 356, 360 (6th Cir.2008) (quoting *Virginia v. Hicks*, 539 U.S. 113, 118–19, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003)); *see also Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 129, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) ("[A]n overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable.").

95 *Board of Airport Comm'rs of City of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574, 107 S.Ct. 2568, 2572, 96 L.Ed.2d 500 (1987) (internal quotations omitted)."

96 *See Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973).

effect from a statute's potential application in circumstances beyond those that involve clearly unprotected speech or conduct.[97]

As noted in the forum analysis above, UC's campus features public forums, and speech restrictions in public forums must be, *inter alia*, narrowly-tailored. To be a constitutional time, place, and manner restriction, a speech policy must be narrowly tailored to serve a significant government interest,[98] and must not "burden substantially more speech than is necessary to further the government's legitimate interests," or be "substantially broader than necessary."[99] Put differently, a content-neutral regulation is deemed narrowly tailored to a significant governmental interest if "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[100] "Even a legitimate government interest cannot justify a restriction if the restriction accomplishes that goal at an inordinate cost to speech."[101]

Meanwhile, a "prior restraint" is any statute, ordinance, or policy that vests an administrative official with discretionary power to control in advance the use of public places for First Amendment activities.[102] "Although prior restraints are not per se unconstitutional, they

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97 *See Virginia v. Hicks*, 539 U.S. 113, 124, 123 S.Ct. 2191, 2199, 156 L.Ed.2d 148 (2003).

98 *United States v. Grace*, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983).

99 *Ward*, 491 U.S. at 800, 109 S.Ct. 2746.

100 *Turner Broad. Sys.*, 512 U.S. at 662, 114 S.Ct. 2445 (quoting *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)).

101 *Hays County*, 969 F.2d at 118.

102 *See Kunz v. People of the State of New York*, 340 U.S. 290, 293-94, 71 S.Ct. 312, 314, 95 L.Ed. 280 (1951).

bear a heavy presumption against constitutionality and must be carefully scrutinized to guard against the unreasonable curtailment of free expression."[103]

The Supreme Court has explained why this presumption of unconstitutionality and accompanying heavy scrutiny are necessary: "it is offensive not only to the values protected by the First Amendment, but to the very notion of a free society-that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so."[104] *Watchtower* is instructive here. In that case, the Supreme Court considered a local ordinance which prohibited "'canvassers' and others from 'going in and upon' private residential property for the purpose of promoting any 'cause' without first having obtained a permit."[105] The village did not charge for the permit, and permits were routinely issued after the applicant filled out detailed paperwork.[106]

The *Watchtower* court listed three reasons it found such expansive permit requirements offensive to the First Amendment. First, "[t]he requirement that a canvasser must be identified in a permit application filed in the mayor's office and available for public inspection necessarily results in a surrender of that anonymity."[107] Second, "requiring a permit as a prior condition on the exercise of the right to speak imposes an objective burden on some speech of citizens holding religious or patriotic views" such that it "will prevent them from applying for such a license." Third, "there is a significant amount of spontaneous speech that is effectively banned."[108]

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[103] *Roberts*, 346 F. Supp.2d at 869 (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 225, 110 S.Ct. 596, 604, 107 L.Ed.2d 603 (1990)); *see also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553-58, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) (noting that any system of prior restraint bears "a heavy presumption against its constitutional validity.")

[104] *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 165-66, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002).

[105] *Id*. at 154, 122 S.Ct. 2080.

[106] *Id*. at 154-55, 122 S.Ct. 2080.

[107] *Id*. at 167, 122 S.Ct. 2080. Similarly, the Sixth Circuit in *McGlone v. Bell* held unconstitutional a permit requirement at a public university, which "requires individuals and small groups to submit information about their identity and about the program purpose." 2012 U.S. App. LEXIS 8266, *37 (6th Cir. Apr. 23, 2012). This requirement violated the speaker's right to anonymous speech and was not narrowly tailored to serve any significant government interest. *Id*. at *37-39.

The Court expressed its concerns over permitting spontaneous speech in the following words: "there is a significant amount of spontaneous speech that is effectively banned by the ordinance. A person who made a decision on a holiday or a weekend to take an active part in a political campaign could not begin to pass out handbills until after he or she obtained the required permit. Even a spontaneous decision to go across the street and urge a neighbor to vote against the mayor could not lawfully be implemented without first obtaining the mayor's permission."[109]

ii. *UC's prohibition on all spontaneous speech throughout campus defies applicable precedent.*

The Sixth Circuit's recent *McGlone* opinion struck down a fourteen-day notice period for an outsider to speak on campus areas that were public forums.[110] Cases dealing with notice requirements on campus do not generally involve speech by students;[111] the cases upholding such requirements involve outsiders to the campus community.[112]

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108 *Id*. at 167, 122 S.Ct. 2080.

109 *Watchtower*, supra, 536 U.S. at 167, 122 S.Ct. 2080.

110 *McGlone*, 2012 U.S. App. LEXIS 8266 at *34-37.

111 The only case known to counsel for Plaintiffs which involved a notice period generally applicable to students, as opposed to outsiders, led to the court striking down the notice requirement. *See Roberts v. Haragan*, 346 F. Supp.2d 853, 868-69 (N.D. Tex. 2004) (invalidating two-day advance notice requirement for students to speak in designated areas); *cf. Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968) (upholding 48 hour notice requirement for large student demonstration but noting that "[w]e are not required to decide whether the First Amendment rights of students would have been violated if the University sought to enforce this [notice] provision under circumstances where advance notice was not feasible, as, for example, in the case of the spontaneous demonstrations following the

In addressing the exact issue of whether notification requirement on a university campus are an overbroad and insufficiently narrowly-tailored prior restraint on speech, the court in *Roberts v. Haragan* extensively analyzed Texas Tech's two-day notification periods. There, the plaintiffs contended that Texas Tech's speech policy "acts as an unconstitutional prior restraint on students' free-speech rights because it requires a student to acquire a permit at least two business days before engaging in protected speech on the campus outside of the designated free-speech zones but in areas of the campus that are public forums nonetheless."[113] The plaintiffs further posited that "the requirement of prior permission burdens more expressive activity than the University has a significant interest in regulating as to time, place, or manner. In particular, Plaintiff contends that a student would be required to get permission just to deliver a speech to classmates on the way to class if he were outside the designated forum areas but still within the public forum areas of the campus, such as on a campus sidewalk."[114]

In explaining why the two-day notification period was overbroad and not narrowly tailored, the Court explained that "the University's prior permission requirement is certainly not onerous and may be reasonable when applied to most expressive activities in nonpublic forums on campus. However, just because the requirement of advance permission is not unreasonably

lamentable assassination of Dr. King. The University has made clear it would not insist on advance notice under such circumstances.").

112 *See, e.g.*, *Bowman v. White*, 444 F.3d 967 (8th Cir. 2006) (upholding three-day notice period for "non-university entities"; case involved a non-student outside preacher); *Bloedorn v. Grube*, 631 F.3d 1218 (11th Cir. 2011) (upholding 48-hour notice requirement for outside, non-student, non-sponsored speaker); *Sonnier v. Crane*, 613 F.3d 436, 445 (5th Cir. 2010) (upholding seven-day notice requirement for speech by non-students); *ACLU v. Mote*, 423 F.3d 438 (4th Cir. 2005) (upholding five-day notice requirement for non-student speakers).

113 *Roberts v. Haragan*, 346 F.Supp.2d 853, 869, 194 Ed. Law Rep. 243 (N.D. Tex 2004).

114 *Id*. (further noting the University interest in regulation: "In response, the University argues that it has a significant interest in preserving an environment suitable for classroom instruction and library study. The University also asserts an interest in knowing what activities are going to occur if for no other reason than to prevent scheduling two activities at the same place and time. In addition, the University considers issues of noise and safety associated with pedestrian and vehicular traffic to be a significant concern.").

burdensome, the University is not thereby permitted to control such casual conversation and otherwise *non-disruptive* expressive activity in the public forums on campus. The standard for regulations on expression in public forums is not that they be reasonable, but that they are narrowly tailored to promote a significant governmental interest."[115] Further it is simply not the case that "burdening all expressive activities in public forums with its prior permission requirement is necessary to serve its significant interests, even though the University may indeed have a significant interest in controlling *some* expressive activities."[116]

Finally, the court concluded "the Prior Permission section is not narrowly tailored and therefore it is unconstitutional because it sweeps too broadly in imposing a burden on a substantial amount of expression that does not interfere with any significant interests of the University. Furthermore, the argument that permission-free alternative locations are available in the designated forum areas is unavailing where the regulation burdens free expression without sufficient justification in those other areas that this Court has determined must also be considered the irreducible public forums on the campus."[117] In so concluding, the Court instructively provided an example of a "more carefully drafted regulation" that would be sufficiently narrowly-tailored to a university's interests to survive constitutional scrutiny: such a policy would not require prior permission for all "free expression activity," but rather, would limit the prior permission requirement to activities such as those "expected to draw a crowd of more than

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115 *Id.* at 869.

116 *Id.*, at 870.

117 *Id.* (citing *Schneider v. State*, 308 U.S. 147, 163, 60 S.Ct. 146, 151-52, 84 L.Ed. 155 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place")).

25 people," which "would implicate the University's significant interest in controlling large gatherings that might disrupt classes, block building access, or create traffic hazards."[118]

Recent Sixth Circuit precedent features an abundance of less specific though highly-instructive examples of unconstitutionally overbroad and poorly-tailored notification periods, none of which rise to the level of onerousness of UC's prior restraints. In *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, the Sixth Circuit found a municipal ordinance regulating parades to be unconstitutional because it applied too broadly to include small groups of individuals.[119] The Dearborn ordinance defined "special event" as "any walkathon, bikeathon, or jogging group or other organized group having a common purpose or goal, proceeding along a public street or other public right-of-way."[120] The court found this provision to be overly broad, noting that "[p]ermit schemes and advance notice requirements that potentially apply to small groups are *nearly always overly broad and lack narrow tailoring*."[121] (Dearborn found 200 individuals comprised a "small group."). "Any notice period is a substantial inhibition on speech" because notice provisions can "stifle our most paradigmatic examples of First Amendment activity."[122] "[T]he simple knowledge that one must inform the government of his desire to speak and must fill out appropriate forms and comply with applicable regulations discourages citizens from speaking freely." [123]

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118 *Id.*

119 *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600 (6th Cir. 2005).

120 *Id.* at 608.

121 *Id.* (emphasis added).

122 *Dearborn*, 418 F.3d at 605.

123 *Id.* (quoting *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir.1984)).

In *Parks v. Finan* in 2004, the Sixth Circuit invalidated as an unconstitutionally overbroad prior restraint a notification period for speech on the grounds of the Ohio Statehouse ("Capitol Square").[124] In concluding that "the permitting scheme is a substantially overbroad restriction on individual speech [because it] sweeps a broad array of ordinarily protected speech within its regulatory purview," the court explained "it is hard to see how wearing sandwich boards is in any relevant respect different from wearing an expressive T-shirt or carrying an expressive balloon. The permitting scheme, then, by the breadth of the activity that to which it applies, raises serious First Amendment concerns."[125]

The court's elaborate reasoning warrants further citation because it is highly instructive in this case: "under the permit scheme, two friends debating which candidate should be elected President in November while walking across the Capitol grounds are regulated by the permitting scheme, at least according to its literal terms, but it is highly unlikely that these people would continue their discussion if they knew a permit was required to do so. The permitting scheme also constrains the heckler who wishes to disagree with the expressive activity of a permitted activity."[126] Importantly, the Court continued, "the bureaucratic formalities involved in obtaining a permit are likely to chill casual speakers who would otherwise make statements on Capitol Square but find that the benefit of expression is far outweighed by the expense of applying for a permit. While these examples may appear far-fetched, there is no apparent way that the present regulation, applied as it has been, can easily be read not to apply."[127]

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124 *Parks v. Finan*, 385 F.3d 694 (6th Cir. 2004).

125 *Id.*

126 *Id.*

127 *Id.*

Finally, the Court further observed "we are instructed by the Supreme Court in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 167, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002), to give weight to the concern that a permitting scheme will stifle spontaneous expressive activity," and "[w]hile there are some important differences between the permit scheme in this case and the one at issue in *Watchtower*, one of the core reasons for invalidating the latter clearly applies to the permit scheme in this case as applied to individuals. That is, the permitting scheme effectively bans spontaneous speech on the Capitol grounds."[128] "The permit scheme labels those lone individuals with something to say as dangerous, while failing to offer what distinguishes them from other lone individuals who traverse onto capitol grounds, for example, to enjoy their lunch on the Statehouse steps. The distinctions—the addition of a sign, a leaflet, or something to say—become, in the words of the Ninth Circuit, 'absolutely empty in terms of the [regulation's] stated goals.'"[129]

As such, the Sixth Circuit adopted the District Court's reasoning, holding that (1) the "scheme proscribed more speech than was necessary to effectuate the "laudable" and important government interests of "preserv[ing] ... the historical site, maintaining order and safety, ensuring that adequate support services are available, and maintaining the primary use of Ohio's Statehouse to carry out the business of state government...."[130] and (2) the permit scheme constituted an impermissible prior restraint on speech, a prior restraint that was unconstitutional on its face with respect individual speakers, and as applied to Parks.

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128 *Parks*, supra, at 702.

129 *Id*. (citing *Grossman v. City of Portland*, 33 F.3d at 1207).

130 *Id*.

In 2008, in *Trewhella v. Findlay*, the Northern District of Ohio invalidated a notice requirement as a substantially overbroad prior restraint on speech.[131] There, the plaintiffs challenged "the requirement to obtain a permit; the broad discretion afforded to a few individuals; and the 30-day notice requirement." In considering whether the policies were "narrowly tailored to serve a significant government interest and [left] open ample alternative channels of communication,"[132] the court found that "the permit requirement is [an unconstitutional] prior restraint because it conditions speech on the prior approval of public officials."[133] Specifically, the court found "the permit scheme overbroad for the simple fact that *it appears to apply to all sorts of speech*."[134] Even though the court concurred that the city "has a significant interest in providing for traffic and crowd control for certain events in order to protect the public's safety and welfare," it ruled that "the notice provision burdens substantially more speech than is necessary to accomplish this legitimate goal and is not narrowly tailored to serve the City's interests."[135]

Further, the *Trewhella* court noted "given the apparent negligible effort required by the City to approve a permit application, it is unclear why 30 days are required."[136] "Such a substantial inhibition on speech cannot be justified by the [government's] failure to respond to requests in a more timely fashion."[137]

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[131] *Trewhalla v. Findlay*, 346 F. Supp. 2d 853 (N.D. Ohio 2008).

[132] *Perry Educ. Ass'n*, 460 U.S. at 45, 103 S.Ct. 948.

[133] *Id.* (citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553-58, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975)).

[134] *Id.* (Emphasis added).

[135] *Id.*

[136] *Id.* at 606. ("The Court agrees with the City that it has a significant interest in providing for traffic and crowd control for certain events in order to protect the public's safety and welfare. However, the AEP's 30-day notice provision burdens substantially more speech than is necessary to accomplish this legitimate goal and is not narrowly tailored to serve the City's interests. Given the apparent negligible effort required by the City to approve a permit application, it is unclear why 30 days are required. . . . Such a substantial inhibition on speech cannot be justified by the [government's] failure to respond to requests in a more timely fashion.").

Earlier in 2012 in *Bays v. Fairborn*, the Sixth Circuit addressed a notification requirement for non-commercial solicitation at a festival on public grounds.[138] The city asserted "reduced congestion and smooth traffic flow as the purposes behind the solicitation policy," to which the Court responded (1) "Fairborn 'must do more ... than assert interests that are important in the abstract;'"[139] and (2) "[e]ven assuming Fairborn does have a significant interest in crowd control and smooth traffic flow, however, the solicitation policy is unconstitutional because it is not narrowly tailored to further those interests. * * * The scope of the Festival solicitation policy, which prohibits sales or soliciting of causes outside of booth space, is 'substantially broader than necessary.' On its face, the policy prohibits any solicitation of causes, including displaying signs, distributing literature or leafletting, and one-on-one conversations, if those conversations are motivated by a desire to solicit certain causes, such as the plaintiffs' religious message."[140]

In *Bays*, the ban before the Court was, like UC's, not a total ban on a particular speech: "[t]o be sure, the Festival does offer booths for those wishing to distribute literature and display signs, so in that sense the solicitation policy is not a total ban on those activities."[141] Nevertheless, the Court found that this restriction was not narrowly tailored to achieve the city's interests, relying in part on prior Sixth Circuit precedent.

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137 *Id*. at 606.

138 *Bays v. Fairborn*, 668 F.3d 814 (6th Cir 2012).

139 *Id.* at 823 (citing *Saieg v. City of Dearborn*, 641 F.3d 641 F.3d 727, 737 (6th Cir. 2011) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994)) (internal alterations omitted).

140 *Bays*, 668 F.3d at 823.

141 *Id.* at 824.

In *Saieg v. City of Dearborn*,[142] the Sixth Circuit invalidated a city festival's leafletting restriction due to lack of narrow tailoring, even though potential speakers could obtain a booth and information table in another area.[143] The court explained that "mere speculation about danger is not an adequate basis on which to justify a restriction of speech."[144] *Saieg* struck down a policy that simply restricted leafletting without an information table, while UC policies are substantially broader and include bans on all speech absent five to 15 days of prior notification.

In its just several months old decision of *Ohio Citizen Action v. Englewood*, the Sixth Circuit considered the plaintiff's argument that a curfew on door-to-door solicitation "is not narrowly tailored to a significant interest of the City and that it does not leave ample alternative channels for OCA to communicate its message" against the city of Englewood's argument that "the curfew provision serves the City's significant interests in protecting the privacy rights of its citizens and preventing crime."[145] The Court held that neither the city's interests in protecting the privacy of its citizens or its citizens from crime justified the ban, since "the City's 6 P.M. curfew is not narrowly tailored to its interest in preventing crime by door-to-door canvassers or by individuals posing as such."[146]

Beyond the Sixth Circuit, the seminal case illustrating an appropriate invalidation of prior restraints throughout a forum, as insufficiently narrowly-tailored and overbroad, is *Community for Creative Non-Violence v. Turner*. There, the D.C. Circuit held that a Washington

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[142] 641 F.3d 727 (6th Cir. 2011).

[143] *Id.* at 738–40.

[144] *Id.* at 739 (internal quotation marks and alterations omitted); *see also Turner Broad. Sys., Inc.*, 512 U.S. at 664, 114 S.Ct. 2445 (requiring that the government "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way").

[145] *Ohio Citizen Action v. Englewood*, 671 F.3d 564 (6th Cir. 2012).

[146] *Id.*

Metropolitan Area Transit Authority (WMATA) regulation, which required permits for organized free speech activities at Metro stations, failed to provide ample alternatives means because there were "no WMATA areas not covered by the permit requirement" and hence "no intra-forum alternative[s]."[147]

iii. *UC's imposition of prior restraints throughout all of campus are overbroad and not narrowly-tailored.*

Here, in light of the breadth and specificity with which so many courts have previously spoken on this issue, very little factual analysis is needed to reveal that UC's prior restraints throughout campus are unconstitutionally overbroad and insufficiently narrowly-tailored.

a. The burdens UC imposes on free speech in public forums are onerous.

As an initial matter, alarmingly, and perhaps even shockingly, Defendants assert that "the University has an interest in regulating ***ALL*** expressive activity on its campus."[148] And regulate it does – even more so than any of the governmental actors whose policies above were invalidated.

First, unlike the Texas Tech notification requirements invalidated by the Court *Roberts*, there is no public forum on campus, including what UC tritely refers to as the "Free Speech Zone," where students can engage in spontaneous speech. Instead, prior restraints, in the form of notification requirements, proliferate. The Use of Facilities Policy Manual imposes a ten day prior restraint on "[a]nyone requesting to demonstrate, picket or rally must give prior notice of ten (10) working days to University Police."[149] These terms are not defined.

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[147] *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1393 (D.C. Cir. 1990).

[148] Response to Plaintiffs' Request for Admission No. 5 (mislabeled as No. 9), attached hereto as Exhibit B.

[149] UC Use of Facilities Policy Manual, p. 15, attached to First Amended Verified Complaint as Exhibit A (Doc. No. 15).

This prior restraint prohibits all spontaneous speech that may constitute a demonstration, picket, or rally, even though the Sixth Circuit has articulated that (1) spontaneous speech must be protected; and (2) speech such as demonstrations, pickets, and rallies are clearly protected speech ("The First Amendment is implicated because picketing * * * is inherently 'expressive activit[y] involving 'speech' protected by the First Amendment.").[150]

Further, this regulation confines all speech that may constitute a "demonstration, picket or rally" to the Free Speech Zone, which comprises less than 0.1 percent of the University's total West Campus.[151] Thus, UC entirely prohibits students from engaging this type of speech, typically anti-authoritarian in nature, in each of the other traditional and designated public forums delineated above – space which includes the other 99.9 percent of campus. This prohibition applies irrespective of whether the speech is undertaken by a group or individual, irrespective of whether the speech is disruptive or non-disruptive, irrespective of whether the speech garners a crowd or not, and irrespective of whether the speech is noisy or quiet.

Next, the Use of Facilities Policy Manual requires ten days notice for speech "requiring security," while the MainStreet Event Guide requires "a minimum of 15 business days before the requested date is required" "for events that require security and grounds."[152] Yet again, these standards are not defined. If a student guesses that his speech does not require security, and he is wrong, he is prohibited from speaking. This steers students towards cautiously estimating otherwise, and choosing the lengthier waiting period in the process. In so doing, the vagueness of the statute strips students of an extra five days of speech.

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150 *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008).

151 First Amended Verified Complaint ¶¶ 27-32, 36-38 (Doc. No. 15).

152 *See* pp. 12, 11 of each respective policy.

If and only if a student is confident that his speech neither requires security or grounds or is a demonstration, picket, or rally, he still faces a five-day prior restraint on speech in each and every traditional and designated public forum on campus: the MainStreet Student Event Guide provides that "all event requests must be received no later than five business days before the requested date;"[153] while the Use of Facilities Policy Manual similarly imposes, *at minimum*, a five day prohibition on spontaneous speech, requiring that students "allow a *minimum* of five (5) working days notice for a written request."[154]

Finally, signature gathering beyond the Free Speech Zone, which is only permitted for students, if at all, at McMicken Commons, TUC Plaza, MainStreet Express Mart Lobby, and CRC East and West Plazas,[155] and thus forbidden on each other public forum articulated above, is governed by the MainStreet Student Event Guide, which specifically states "sales and solicitation events *require approval by Mainstreet Operations and* must be scheduled using the online request form."[156] "Solicitation" is defined as "the activity or process of seeking to obtain support of an individual for a cause, movement, doctrine, *or commercial product* through persuasion or formal application."[157] Defendants' litigation position that this policy in only "intended to refer to requests for *commercial* sales or solicitations" is in flagrant conflict with the plain language of the UC policy, which explicitly embraces the OAC definition in the section

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153 *See* MainStreet Student Event Guide, pp. 3, 11, attached hereto as Exhibit C.

154 UC Use of Facilities Policy Manual, p. 12 (emphasis added), attached to First Amended Verified Complaint as Exhibit A (Doc. No. 15).

155 MainStreet Student Event Guide, p. 12, attached hereto as Exhibit C.

156 MainStreet Student Event Guide, p. 11, attached hereto as Exhibit C.

157 OAC 3361:10-51-01(A)(1).

governing "Sales and Solicitations."[158] Consequently, effectively all signature gathering is subject to UC's standardless approval.

As an additional burden on speech such as signature-gathering and leafleting, UC "assigns" students to a single forum at a time, and prohibits "walking around" amongst forums: the University (through Campus Scheduling) was very explicit in its email instructions to Plaintiffs, indicating "you are *assigned* to the Northwest Corner of McMicken Commons," and "you are not permitted to walk around campus, if we are informed that you are, [the Office of] Public Safety will be contacted."[159]

b. These onerous burdens are overbroad and not narrowly tailored.

Much like the invalidated regulations in *Community for Creative Non-Violence v. Turner*, UC prohibits spontaneous speech on all corners of its campus, and requires its permission before any type of speech can take place in any of its traditional or designated public forums. And much like the invalidated regulations of speech in *Parks v. Finan, Bays v. Fairborn, Trewhella v. Findlay*, and *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, UC prohibits spontaneous individualized speech and one-on-one speech just as it prohibits spontaneous speech by large groups. Further, just as with the invalidated regulation of speech in *Saieg*, UC prohibits speech upon the mere speculation that the speech could disrupt its mission, rather than based on evidence that it has or is doing so. Meanwhile, even less onerous notification requirements on campus were struck down as prior restraints, where plaintiffs and defendants asserted interests identical to those in this case, in *Roberts v. Haragan.*

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158 *Id.*

159 *See* Exhibits G and I to First Amended Verified Complaint (Doc. No. 15).

Finally, UC's prohibition against "walking around" under threat of criminal sanction, while gathering signatures, is unconstitutionally overbroad. In *Bays v. Fairborn*, the Sixth Circuit, ruled that "[t]he overbreadth of the solicitation policy is clear when compared to the restrictions upheld in the cases cited by Fairborn. In *Heffron*, the state fair rule only prohibited the distribution of materials and did 'not prevent organizational representatives from walking about the fairgrounds and communicating the organization's views with fair patrons in face-to-face discussions' or displaying signs."[160] Thus, there can be no genuine issue as to any material fact or law, and reasonable minds could only reach the conclusion that UC combined speech policies, most prominently its notification requirements and other policies articulated herein, are overbroad.

Moreover, these policies are not justified by UC's asserted interests. The University no doubt had a legitimate interest in regulating speech on campus to some extent: Defendants articulate that interest as preventing "expressive activities that will hamper the University's ability to its primary mission, the education of its students," and this "interest remains the same irrespective of which activity is involved."[161] UC further claims that it maintains its strict limitations on signature gathering and other free speech "to enable the University to do what is necessary for activities to take place under peaceful and safe conditions."[162]

Without providing specificity, UC then claims that these interest warrant, at minimum, a five-day waiting period before any otherwise unplanned spontaneous free speech may occur anywhere on its campus.[163] As to why a policy simply directly prohibiting disruptive conduct, such as UC maintains for the Free Speech Zone, is insufficient to meet this interest, UC has no answer.[164] Finally, UC concedes that Plaintiffs' signature gathering is not disruptive to its mission, conceding that "no additional security was required when Plaintiffs gathered signatures on February 15, 2012."[165]

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[160] *Bays*, supra, (citing *Heffron*, 452 U.S. at 643–44, 655, 101 S.Ct. 2559 ("[Speakers] may mingle with the crowd and orally propagate their views.")).

[161] Answer to YAL Interrogatory No. 8, attached hereto as Exhibit E.

[162] Answer to YAL Interrogatory No. 13, attached hereto as Exhibit E.

UC's interests do not justify the fact that there is no area on campus where YAL students can gather signatures without first obtaining permission, *i.e.*, a license issued by the government to authorize one to engage in First Amendment rights. The University's requirement that Plaintiffs receive permission after a notification period before engaging in expressive activity that would not interfere with any legitimate interest of the University is therefore not narrowly tailored in service of *any* identifiable substantial government interest, including that of preventing actual disruption to the educational process.

Even if YAL's signature-gathering could be shown to be a disruption to UC's educational mission, there is no justification for why UC requires ten days to plan for this putative "disruption": there is obviously no need to draw up a complex strategy, be it for security purposes or otherwise, to plan for several students gathering signatures in a quiet, peaceful manner. What is it that UC must do over the course of these ten days to prepare for this non-disruptive speech?

Separately, it is no defense that the permitting process and waiting period is needed because larger, more disruptive groups may wish to gather signature at UC. In fact, prohibiting the spontaneous and non-disruptive speech of these students simply to provide a check against

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163 Answer to YAL Interrogatory No. 15, attached hereto as Exhibit E.

164 Answer to YAL Interrogatory No. 21, attached hereto as Exhibit E.

165 Answer to YAL Interrogatory No. 23, attached hereto as Exhibit E.

this separate hypothetical occurrence would demonstrate the law to be something other than narrowly-tailored: it would prohibit substantially more speech than necessary to prevent disruption of education.

UC's most compelling explanation for the waiting period would seem to be that it has *created* the very problem that necessitates the solution of a permitting process and waiting period: by limiting expressive activity to one tenth of one percent of the entire campus, the demand of UC's tens of thousands of students to speak greatly outpaces the UC's supply of space to speak. This explanation is not a defense at all: a state actor cannot claim to have crafted a narrowly-tailored advancement of an interest that arises from its own prior malfeasance. In this sense, the unconstitutionality of the onerous waiting period and permitting process for the Free Speech Zone is inextricably intertwined with the unconstitutional prohibition of political speech everywhere else on campus.

In *Parks v. Finan*, the Sixth Circuit aptly explained why aggressive and universal speech prohibitions are not narrowly-tailored to serve the types of interests UC asserts:

> Particular types of individual activity that might cause damage, endanger public safety, or interfere with other speakers, can be governed just as effectively, if not more so, by regulations prohibiting or limiting such actions directly, without imposing the requirement that individuals wanting to speak or carry a sign obtain a permit 15 days ahead of time. * * * The blanket application of the permitting scheme to individuals, in contrast, is not sufficiently narrowly tailored to the interests of protecting property, promoting safety, and permitting others to speak.[166]

Indeed, UC already maintains a policy prohibiting disruptive speech.[167] And one of the closest urban campuses to UC, Wright State University, sufficiently achieves its interests, which are identical to UC's, with nothing more than such an anti-disruption policy,[168] concomitantly providing "[a]ny individual or group may use, without prior notification, on any day of the week during daylight hours, any publicly accessible outdoor area of the University's Dayton and Lake campuses to collect signatures…."

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[166] *Parks*, supra.

[167] UC Use of Facilities Policy Manual, p. 15, attached to First Amended Verified Complaint as Exhibit A (Doc. No. 15).

As a parallel matter, it is well *within* the universities interest to assist, rather than stifle, students who wish to educate other students on the existence and merits or demerits of a statewide ballot drive to amend the Ohio Constitution. As the Fifth Circuit put it, "[t]here is no substantial evidence that a student's handing out of a free student newspaper would affect the University's academic mission or the rate of crime on campus. The handing out of a political newspaper filled with editorials and reportage about matters of public concern is compatible with the University's academic mission."[169]

By failing to simply directly prohibit those expressive activities that hamper its educational mission and/or provide security threats, UC's combined speech policies cease to be narrowly-tailored to serve its significant interests. As such, there is no genuine issue of material fact or law, and reasonable minds could only conclude that UC's notification requirements, alongside the other regulations outlined herein, are unconstitutional.

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168 *See Wright State Faculty Handbook*, Regulation of Time, Place and Manner ("Any individual or group may use, without prior notification, on any day of the week during daylight hours, any publicly accessible outdoor area of the University's Dayton and Lake campuses to collect signatures, distribute materials, and/or speak, as long as they do not disrupt the functioning of the University. Academic departments, programs and other units and registered student organizations may schedule University space to bring speakers and programs of their choice to the Dayton and Lake campuses on a space available basis. Such speakers shall have the same access to the University facilities as their sponsor. This Policy is not applicable to situations arising within the context of normal classroom instruction and discussion."), available at http://admit.wright.edu/academics/fhandbook/demo_march.html.

169 *Hays County Guardian v. Supple*, 969 F.2d 111, 117 (5th Cir. 1992 (finding certain outdoor areas of a university to be a designated public forum, designated for the speech of students).

D. *UC's speech policies unconstitutionally couple vague standards and excessive bureaucratic discretion with prior restraints on speech.*

The overbreadth and insufficiency with which UC notification requirements and other burdens on speech are narrowly-tailored to serve its interests are vastly enhanced by the vagueness of UC's burdens on speech. As an initial matter, "because unfettered governmental discretion over the licensing of free expression 'constitutes a prior restraint and may result in censorship,' a plaintiff may bring facial challenges to statutes granting such discretion 'even if the discretion and power are never actually abused.'"[170]

First, UC's speech policies, through notification requirements and other suppressive burdens, condition all speech on prior approval of UC. "When a law predicates expressive activity on the prior acquisition of a permit, the law must contain narrow and precise standards to control the discretion of the permitting authority."[171] To avoid violating free expression, courts have required that a permitting scheme leave relatively little discretion in the hands of public officials regarding whether to grant a permit.[172]

Second, vague policies are unconstitutional in their own right. This is because, when vague, "even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression."[173] With respect to political speech, the Supreme Court has spoken of the test to be applied to regulations that implicate vagueness concerns: The test is whether the language * * * affords the "(p)recision of regulation (that) must be the touchstone in

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170 *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 755–56, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988); *Miller v. City of Cincinnati*, 622 F.3d 524, 532 (6th Cir.2010).

171 *Parks v. Finan*, 385 F.3d 694, 699 (6th Cir. 2004) (citing *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992)).

172 *See FW/PBS, Inc*., 493 U.S. at 225-26, 110 S.Ct. at 605 (1990).

173 *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) (referring to an official's overly broad discretion in granting or denying a speech-related permit).

an area so closely touching our most precious freedoms."[174] Otherwise, vague laws may not only "trap the innocent by not providing fair warning" or foster "arbitrary and discriminatory application" but also operate to inhibit protected expression by inducing "citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'"[175] "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[176]

In pursuing a void-for-vagueness claim, a plaintiff must establish to a court's satisfaction that "[a regulation's] prohibitive terms are not clearly defined such that a person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion."[177] The void-for-vagueness doctrine not only ensures that laws provide "fair warning" of proscribed conduct, but it also protects citizens against the impermissible delegation of basic policy matters "for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [178]

Without "clear standards guiding the discretion of public officials" with enforcement authority, there is a risk that those officials will "administer the policy based on impermissible factors."[179] As a result, laws or regulations that, for example, give officials "unbridled discretion over a forum's use" are impermissible because of the "danger of censorship and of abridgement

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174 *NAACP v. Button*, 371 U.S., at 438, 83 S.Ct., at 340.

175 *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S.Ct. 1316, 1322, 12 L.Ed.2d 377 (1964), quoting *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)).

176 *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963).

177 *United Food & Commercial Workers Union Local 1099 v. Southwest Ohio Regional Transit Auth.*, 163 F.3d 341, 358–59 (6th Cir.1998) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)).

178 *UFCW*, 163 F.3d at 358–59 (citing *Grayned*, 408 U.S. at 108–109, 92 S.Ct. 2294).

179 *UFCW*, 163 F.3d at 358–59.

of our precious First Amendment freedoms."[180] A statute that fails to constrain "an official's decision to limit speech" with "objective criteria" is unconstitutionally vague. [181]

Here, UC has enhanced the unconstitutionality of its notification requirements by coupling them with vague terms and standardless criteria, vesting low-level bureaucrats with too much arbitrary discretion in the process. First, UC policy fails to establish a definition of "demonstration, picket, or rally." A person of ordinary intelligence would not presume one-on-one communication with fellow students regarding the merits of a proposed state constitutional amendment, pursuant to obtaining those students' signatures, would constitute either a demonstration, picket, or rally. However, a personal of reasonable intelligence could not necessarily presume otherwise either – gathering signatures often requires grandstanding for the cause one is advocating.

In his declaration, Mr. Morbitzer, a Deans List student and President of UC YAL and the UC Bearcat Band, explains that he does not know whether gathering signatures for the Ohio Workplace Freedom Amendment is a "demonstration, picket, or rally."[182] The following excerpts from pages 77-87 of Mr. Morbitzer's deposition confirms the same and further illustrates the confusion of these undefined terms, as applied to expressive activities such as signature-gathering:

> Q: Do you know what the word "demonstration" means? [Note, referring to the Policy Manual]
> A: In this context, when someone says "demonstration," I think of a -- a speech activity with an organized number of people, so . . . [a]protest is an example of one.

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180 *Id.*

181 *Id.*

182 April 26, 2012 Declaration of Christopher Morbitzer, attached hereto as Exhibit D.

Q: Okay. How about the word “picket,” do you know what that means?
A. In the same way that I know what “demonstration” means, that – you know, it’s – I tend to use those terms of as synonyms. So whether or not that's true, I don't know. But that’s how I know those words, so --

Q: Similar activities?
A: Yes.

Q: -- correct. How about “rally,” you know what that means?
A: “Rally” has a different connotation for me.
…
A: “Rally” just tends to be, for me, anything where people are motivated for action, doing something. So going out and -- you know, talking with people, getting them energized.
. . .
A: And educating people and getting them onboard with issues.
. . .
Q: Would you agree with me that soliciting signatures is different than a demonstration?
[Objection, calling for a legal conclusion]

Q: . . . I’m asking you about your understanding of words in the American language, okay? Would you agree with me that a demonstration is different than soliciting signatures in your understanding?
A: No, not necessarily.

Q: Okay. Tell me how soliciting signatures is the same in any way as a demonstration.
A: Usually -- not usually, but sometimes solicitation of signatures is for a controversial issue and it amounts to what I understand is Demonstration.

Q: Okay. So at a demonstration, you could be collecting signatures, correct? Is that correct?
A: Yes.

Q: Okay. But you can be collecting signatures and not having a demonstration, correct?
A: It's possible.

Q: Well, isn't that what you’re doing now under the agreement we have in this lawsuit, you're collecting signatures, correct?
A: Yes.

Q: Do you think that’s a demonstration?
A; Depends on the context.

Q: I'm asking you, personally,
A: Depends on the context.

Q: The context is this lawsuit and --
A: Yes. In which instance am I collecting signatures? I've been out there since this agreement was made, just by myself; Is that in itself a demonstration, no. But am I with a group of people? Are we out there educating people on -- in this case, right to work [sic], yes. I mean, is that a demonstration, yes.

* * *

Q: Okay. Tell me your thought process, how you would make the determination as to what -- when you're collecting signatures, when would you hit or check off "demonstration" and when you would check off on "other"? What would your thought process be to distinguish between the two?
A: It would amount to my attitude, how I -- how I fell about what – what the vent is, how -- how we're going to act during an event, how -- how --like how controversial the issue is.

Q: Is that appropriate --
A: How many people.

Q: -- for the university, do you believe, to look at how controversial the issue is, in terms of making determinations on locations and time requirements?
A: Yes, because who else would objectively and be able to apply the same rules consistently?

Q: So the -- if, in fact, in terms of collecting signatures, you thought it was a hot-button issue, number of people involved, anything else that would lead you to check "demonstration"?
A: Not to my knowledge right now, no.[183]

These lengthy passages illustrate the confusion over the meaning of the terms "demonstration, picke,t and rally," which, when coupled with UC's prior notification requirements and differential treatment of this speech from other types of speech, with respect to the length of those notification requirements, renders these terms, and the policy they attempt to illuminate, impermissibly vague.

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183 Tr. of April 3, 2012 Deposition of Christopher Morbitzer at pp. 77-81 (Doc. No. 41).

Meanwhile, through discovery, Defendants have utterly abstained from clarifying the contours of these speech policies. First, Defendants admit that they have not undertaken any efforts to define the words "demonstration," "picket," or "rally," claiming instead that (1) these are simply words that "persons of ordinary intelligence readily understand"; (2) there is no written criteria for evaluating whether speech is of this type; (3) in evaluating whether student expressive activity constitutes demonstration, picket, or rally, so as to confine it to the Free Speech Area, students are reliant on University employees' "use of the word as it is commonly understood by persons of ordinary intelligence;" and (4) "gathering signatures" and discussing [the right to work] initiative's merits with fellow students on UC's campus" are *not* demonstrations, pickets, or rallies, as those words are used in its policy.[184]

How is it, then, that two separate University employees enforced this policy, against Plaintiffs, in a manner that characterized petition circulation by students as a demonstration, picket, or rally, and confined it to the Free Speech Zone? "Simple," Defendants say: Defendants merely "believed that Plaintiffs had requested permission to use" the Free Speech Area, *only.*[185] This would be a strange belief for "persons of ordinary intelligence," since Plaintiffs' request, after explicitly asking "is signature gathering considered a 'demonstration, picket, or rally?'" was, *inter alia,* as follows: "[w]e will need to gather signatures, talk to fellow students, and express our support for the initiative, *both* inside the Free Speech Area within McMicken Commons *and also on sidewalks and open outdoor spaces beyond the Free Speech Area*."[186]

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184 Defendants' April 14 Responses to UC YAL's First Set of Interrogatories, Answer to Interrogatories Nos. 1 – 5, attached hereto as Exhibit E.

185 *Id*, at Answer to Interrogatory No. 4, attached hereto as Exhibit E.

186 First Amended Verified Complaint at Exhibit F (Doc. No. 15).

UC employees answered this question and filled this request by relegating Plaintiffs to the Free Speech Zone, the area reserved for demonstrations, pickets, and rallies, noting "you have been *assigned* the North-West corner of McMicken Commons, however you are not permitted to walk around" and "you are not permitted to walk around campus, if we are informed that you are, Public Safety will be contacted."[187] And why threaten Plaintiffs with arrest if they stray from this supposedly "requested" location? To this, Defendants aver "Mr. Morbitzer was merely being informed that Plaintiffs were required to stay in the area Plaintiffs had requested."[188]

Further complicating the matter, UC appears intent on simply allowing low-level student and part-time employees to define the contours of students' free speech rights on campus: neither Brian Short nor Brittany Sisko conferred with any higher level employee, or consulted any policy for clarification, prior to denying Plaintiffs' rights.[189] Consequently, UC's conduct only muddles the meaning of these terms. Meanwhile, UC places, as illustrated by the email responses to Mr. Morbitzer, essentially unlimited discretion over the regulation of free speech on campus into the hands of low-level bureaucrats who appear incapable of handling the task (if indeed UC is being genuine as to their actual beliefs). This arrangement violates the clear precepts articulated above: standards for regulating speech are not precise, and the discretion of those with permitting authority is not controlled.

Finally, UC speech regulations are so unclear that not even UC itself can understand them, even as students who fail to properly schedule their expressive activity, as well as those who do not confine such activity to the Free Speech Zone, are subject to face university

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187 First Amended Verified Complaint at Exhibits I and G, respectively (Doc. No. 15).

188 Answer to YAL Interrogatory No. 20, attached hereto as Exhibit E.

189 *See* Answer to Morbitzer Interrogatory No. 2-6, attached hereto as Exhibit A.

discipline processes and/or criminal charges of trespassing.[190] While the Free Speech Zone features a ten-day notification requirement, UC now asserts that this area is governed by a "5 Day Business Policy," which only requires five days notice. When asked where this "5 Day Business Policy" comes from, UC cites the MainStreet Event Guide.[191] However, the Free Speech Zone appears to be governed by the Use of Facilities Policy Manual, and its ten-day notice requirement, rather than the MainStreet Event Guide.

Even if the Mainstreet Event Guide could be construed as covering the Free Speech Zone, and applying to speech not constituting an ordinary student would not know whether the five or ten day notice requirement applied, since the Use of Facilities Policy Manual requires "[a]nyone requesting to demonstrate, picket or rally must give prior notice of ten (10) working days to University Police,"[192] and the policies themselves, as chronicled above provide no clarification on what constitutes a "demonstration, picket or rally," leaving students in need to contact campus scheduling to make such a determination as to which notice requirement applies. When Plaintiffs did so in this matter, they were immediately assigned to the Free Speech Zone, but nevertheless informed that the five-day notice requirement would apply.

Further complicating matters, the Use of Facilities Policy Manual also requires ten-days notice for speech "requiring security," while the MainStreet Event Guide requires "a minimum of 15 business days before the requested date is required" "for events that require security and grounds."[193] Which notification requirement applies in the Free Speech Zone? What about beyond it? And how are students to know whether their speech requires security or grounds? "Right to work" is a contentious issue involving passionate views on both sides of the debate: does the possibility of a violent reaction to Plaintiffs' speech require security? Do UC's threats to call security on Plaintiffs if they leave the Free Speech Zone mean that ten- or 15-days notice is required, if Plaintiffs fully intend to leave the zone and gather signatures? And if so, which limitation applies?

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[190] First Amended Verified Complaint at Exhibit A (Doc. No. 15).

[191] *See* Answer to Morbitzer Interrogatory No. 7, attached hereto as Exhibit A.

[192] UC Use of Facilities Policy Manual, p. 15, attached to First Amended Verified Complaint at Exhibit A (Doc. No. 15).

[193] *See* pp. 12, 11 of each respective policy.

Defendants unambiguously acknowledge that low-level student employees are left to work out these vagueries, as in this case, they concede that Ms. Sisko was "the primary person responsible for the decision to assign Plaintiffs' signature gathering to the Free Speech Area."[194] Meanwhile, Defendants concede "Ms. Sisko [and Mr. Short] acted in conformance with the University's policies," and "Ms. Sisko was acting in conformance with University policy if, by information Plaintiffs that 'you are not permitted to walk around,' she meant that Plaintiffs were required to collect signatures in the locations they had requested."[195] That two separate university employees could make the same obvious error in evaluating the same question from Mr. Morbitzer demonstrates the arbitrariness of leaving enforcement of vague speech policies to low-level employees. Defendants acknowledge that their low-level employees, charged with enforcing speech policies, receive absolutely no training on how to do so (they do argue, however, inaccurately, that every request to use property is honored, so long as within the notice period).[196] Plaintiffs' obvious request for multiple locations was not honored.

The actual notice requirement period is unknown at the time the request is made, because it is not until after the request is made that it is determined whether security is necessary –

194 Answer to Morbitzer Interrogatory No. 10, attached hereto as Exhibit A.

195 Answer to Morbitzer Interrogatory No. 8, 12(a), attached hereto as Exhibit A.

196 Answer to Morbitzer Interrogatory No. 14, attached hereto as Exhibit A.

security is made aware of the free speech activity only once copied on an email from a low-level employee granting or denying a request. (Ms. Sisko did not confer with anyone prior to copying security on the email, including security, *i.e.* Defendants Shemak and/or Krumpelbeck).[197] This allows the University to invoke the security clause selectively, whenever it wishes, so as to burden speech with which it disagrees, leaving too much unfettered discretion over students' free speech to bureaucrats. And this is a serious threat, since Defendants also believe that these policies have "spirits" which command deference to decisions of low-level employees that strip students of opportunities to engage in protected speech.[198] But a part-time employee "challenging the spirit of the policy" is unacceptable.

In *Gilles v. Garland*,[199] the Sixth Circuit held that a complaint pleaded a sufficient void-for-vagueness claim against a university policy regulating expression on campus grounds by outsiders. The policy at issue stated that "[e]very person with legitimate business at the University has the privilege of free access to the public areas of the buildings and grounds during those hours when they are open, such hours to be determined by the President or designated University official."[200] The university in *Gilles* claimed that the term "legitimate business" required outsiders to have a student group sponsor in order to speak on campus grounds. The Sixth Circuit held that the plaintiff in that case, an outsider seeking to speak on campus grounds but unable to secure a student group sponsor, had adequately alleged that the policy was void for vagueness:

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197 Answer to Morbitzer Interrogatory No. 15, 3, 10, 16, 17, attached hereto as Exhibit A.

198 *See* Answer to YAL Interrogatory No. 22, attached hereto as Exhibit E.

199 281 Fed. Appx. 501 (6th Cir. 2008).

200 *Id*. at 502.

> A policy need not be reduced to writing to survive vagueness challenge. However, if "legitimate business" as used in the written access policy, is defined by "consistent practice" to mean that visitors are denied access to give a formal speech unless invited by a student organization, then the limiting practice must be "well-understood and uniformly applied." *The present pleadings afford no basis for concluding that the student-sponsorship requirement is well-understood. To the extent the pleadings afford any insight into the operation of the unwritten policy, we can conclude only that it was not well understood by university officials charged with most immediate responsibility for enforcing it.*[201]

And as the *Trewhella* Court observed, notably absent are any criteria for granting a permit. This absence * * * leaves this Court with only one conclusion: the permit requirement is unconstitutional. This permit scheme grants the City virtually unchecked discretion to deny permits for content-based reasons."[202]

By failing to define the terms "demonstration, picket, or rally," the Defendants reserve to themselves unbounded discretion in determining which speakers will be confined to the Free Speech Area and subject to the ten-day notification period. "A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view."[203] As the Supreme Court has stated, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional."[204] Consequently, no

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201 *Id*. at 507–08 (internal citations omitted) (emphasis added).

202 *Trewhella*, at 1007.

203 *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130–31(1992) (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc*., 452 U.S. 640, 649 (1981)).

204 *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150–51 (1969).

reasonable person could find any genuine issue of material fact or law on this front: this policy and its unbounded standards lack the precision necessary to be constitutionally permissible.

V. CONCLUSION

For the foregoing reasons, this Court must find the notification requirements, solicitation policies, and attendant burdens outlined herein unconstitutional on their face, and further, as applied to Plaintiffs' speech.

Respectfully submitted,

/s/ Maurice A. Thompson
Ryan D. Walters (0076724)
Trial Attorney for Plaintiffs
Maurice A. Thompson (0078548)
1851 Center for Constitutional Law
208 E. State Street
Columbus, Ohio 43215
Tel: (614) 340-9817
Fax: (614) 365-9564
rwalters@ohioconstitution.org
mthompson@ohioconstitution.org

Curt C. Hartman (0064242)
Co-counsel for Plaintiffs
The Law Firm of Curt C. Hartman
3749 Fox Point Court
Amelia, Ohio 45102
Tel: (513) 752-8800
hartmanlawfirm@fuse.net

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Brian E. Hurley
Robert J. Gehring
Crabbe, Brown & James
30 Garfield Place, Suite 740
Cincinnati, Ohio 45202
bhurley@cbjlawyers.com
rgehring@cbjlawyers.com

Attorneys for Defendants
Gregory H. Williams,
Corinn Shemak,
Cathy Krumpelbeck,
Michael Cureton,
and Brittany Sisko

Lee Ann Rabe
Mia Meucci Yaniko
Ohio Attorney General's Office
Education Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
LeeAnn.Rabe@ohioattorneygeneral.gov
mia.yaniko@ohioattorneygeneral.gov

Attorneys for Defendant Brittany Sisko

*/s/ Ryan D. Walters*______________
Ryan D. Walters (0076724)
Trial Attorney for Plaintiffs
Maurice A. Thompson (0078548)
1851 Center for Constitutional Law
208 E. State Street
Columbus, Ohio 43215
Tel: (614) 340-9817
Fax: (614) 365-9564
rwalters@ohioconstitution.org
mthompson@ohioconstitution.org

Curt C. Hartman (0064242)
Co-counsel for Plaintiffs
The Law Firm of Curt C. Hartman
3749 Fox Point Court
Amelia, Ohio 45102
Tel: (513) 752-8800
hartmanlawfirm@fuse.net